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IN THE

Supreme Court of the United States

October Term, 1970

No. 169

STEPHEN RADICH,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

BRIEF FOR APPELLEE

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IN THE

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STEPHEN RADICH,

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On Appeal from the Court of Appeals of the State of New York

BRIEF FOR APPELLEE

Opinions and Proceedings Below

Appellant Stephen Radich appeals from an order of the Court of Appeals of New York entered February 18, 1970, affirming, with an opinion, two judges dissenting, an order of the Appellate Term, First Judicial Department, of the Supreme Court of the State of New York, entered June 13, 1968, unanimously affirming, without an opinion, a judgment of the Criminal Court of the City of New York, New York County, rendered May 5, 1967, convicting Radich, after a

trial before three judges, one judge dissenting, of malicious injury to and destruction of property (former N. Y. Penal Law §1425 (16)(d), presently N. Y. General Business Law §136), and sentencing him to a fine of $500 or 60 days' imprisonment.

The Court of Appeals opinions are reported at 26 N.Y. 2d 114, 308 N.Y.S.2d 846 and are reproduced in the Appendix at pages 6a-22a.

The Appellate Term affirmance, without opinion, is reported at 57 Misc.2d 1082, 294 N.Y.S.2d 680.

The trial court opinions are reported at 53 Misc.2d 717, 279 N.Y.S.2d 680, and are reproduced in the Appendix at pages 25a-36a.

Statute Involved

Radich was convicted of a violation of section 1425, subdivision 16(d), of the New York Penal Law of 1909, which was repealed, effective September 1, 1967, with the enactment of a completely revised Penal Law. Upon the repeal of the former Penal Law, section 1425 was transferred to the New York General Business Law, section 136, with one change: the provision that permitted the recovery of a civil penalty for each offense in addition to the conviction for a misdemeanor was repealed.

Section 1425(16) of the former Penal Law is reproduced in full below, with the subdivision here in question printed

in italics, and with the exception that the civil penalty provision is omitted.

"16. Any person, who

"a. In any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word figure, mark, picture, design or drawing or any advertisement of any nature, or

"b. Shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, shield or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article or substance on which so placed, or

"c. Shall print, engrave, or otherwise place or cause to be printed, engraved or otherwise placed on any blank check, bill head, letter head, envelope or other business stationery, a representation of any such flag, standard, color, shield or ensign, or shall use any such blank check, bill head, letter head, envelope or other stationery for business purposes or correspondence, or

"d. *Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon* either *by* words or *act,* or

"e. Shall raffle or place in pawn any such flag, standard, color, shield or ensign, or

"f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon *the flag of the United States of America,* or

"g. Shall publicly use or cause any such flag, standard, color, shield or ensign, to be publicly used as a receptacle for the placing, depositing or collecting of money or any other article or thing,

"Shall be guilty of a misdemeanor;* * *

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York,

"This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical on any of which shall be

printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement.

"The possession by any person, other than a public officer, as such, of any such flag, standard, color, shield or ensign, on which shall be anything made unlawful at any time by this section, or of any article or substance or thing on which shall be anything made unlawful at any time by this section shall be presumptive evidence that the same is in violation of this section, and was made, done or created after the first day of September, nineteen hundred and five, and that such flag, standard, color, shield, ensign, or article, substance, or thing, did not exist on the first day of September, nineteen hundred and five."

Questions Presented

1. Are acts that publicly cast contempt upon the flag of the United States by physical use of actual flags protected by the First Amendment?

2. Is the New York statute prohibiting any person from publicly casting contempt upon the American flag by act unconstitutionally vague?

3. Does the statutory exemption of a non-contemptuous use of the flag in an ornamental picture, newspaper or periodical, not connected with an advertisement, deprive appellant, a dealer in sculptures, of equal protection of the laws?

Statement of the Case

The Complaint*

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 7, *County of* New York

State of New York)
County of New York) *ss.*:

Patrolman John P. Burns, *of No.* 19 Precinct, *County of* New York, *City of New York, being duly sworn, deposes and says that on* December 27, 1966 at about 8:30 a.m. and December 28, 1966 *at about* 5:30 p.m. *at* on second floor at 818 Madison Avenue *in the County of* New York, *State of New York, the defendant,* STEPHEN RADICH *did commit the crime of*: did violate section 1425 of the New York State Penal Law, subdivision 16-Paragraph d & f, in that any person who shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon the flag, standard, shield or ensign, of the United States of America, either by words or act or shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America:

under the following circumstances:

your deponent states that at the above location, the Radich Gallery, on December 27, 1966 at 8:30 a.m., he observed that the defendant did have on display, in a large window, facing the public sidewalk, the flag of the United States of America, in the form of a body hanging from a yellow noose. Deponent further states that on December 28, 1966 at about 5:30 p.m., at the above

* Reproduced in the printed Appendix at pp. 2a-3a. Italics identify the standard printed portion of the complaint form.

mentioned location, the defendant did have on public display and for public viewing the flag of the United States of America, in the following manner; 1—in the form of a male sexual organ, protruding from the body of form, in the anterior portion of the body of the form and depicting the erected male penis, protruding from a form of a cross. 2—the flag of the United States of America, wrapped in a chained bundle. 3—the standard of the United States on a form of an alleged elephant. 4—The Union of the flag of the United States of America, depicted in the form of an octopus. 5—the American flag attached to a gas meter. 6—The American flag wrapped around a bundle attached to a two wheeled vehicle. 7—The American flag in the form of a body, hanging from a yellow noose. Your deponent further states that the defendant is the owner and operator of the premises mentioned above.

Wherefore deponent prays that the defendant be dealt with according to law.

Sworn to before me
January 4, 1967

(signed) Ptl. John P. Burns

(signed) Walter J. Bayer
Judge, Criminal Court
of the City of New York

The Evidence at the Trial

The People's Case

Patrolman **John P. Burns** of the New York City Police Department testified that on December 27, 1966, at 8:30 a.m., while on duty, he was outside the premises 818 Madison Avenue (39a-40a).* He observed in the second story window of the building what apeared to be the flag of the United States, formed in the shape of a human body, suspended by a yellow noose (40a, 45a; People's Exhibit 1).

The following day, December 28, 1966, at 5:00 p.m., he returned to 818 Madison Avenue, accompanied by Patrolman Myrich of the Police Department's Photo Unit (40a). They entered an art gallery located on the second floor. The gallery was open to the public, free of charge (45a). Within the gallery, he saw twelve or thirteen exhibits on display (45a). Some of the exhibits employed the flag of the United States (47a). Nearby, he saw the defendant engaged in conversation with an unknown female. When asked by the officer, the defendant identified himself as Stephen Radich, proprietor of the gallery. Thereupon, Patrolman Burns served the defendant with a summons for a violation of Section 1425 of the Penal Law (40a).

When questioned, the defendant said that he was not the person who created the works exhibited in the gallery; however, he received a commission for their sale (40a-41a, 54a-55a).

Each of the objects in which the American flag appeared was photographed and the photographs were received in evidence as People's Exhibits 1 through 9 (41a-44a).

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* References are to the pages of the printed Appendix.

The Defendant's Case

Stephen Radich, the defendant, testified that he is the sole proprietor of an art gallery located at 818 Madison Avenue; he owned the gallery for seven years (76a, 88a). On December 27th and 28th, 1966, he exhibited, in his gallery, thirteen works by Marc Morrel (78a). The gallery was open to the public, there was no admission charge, and brochures were sent out to publicize the exhibit (78a, 88a; Defendant's Exh. B).

All of Morrel's works were for sale. There was a set price list and Morrel's works ranged in price from $250 to $1200. By an arrangement with Morrel, Radich's commission for a sale was thirty-three and one-third per cent (80a, 82a-83a, 88a). He sold one work for $900 and accordingly received a commission of $300 (89a).

Radich considered Morrel's work to be protest art (81a). In his opinion, the works protested war; destruction; certain societies; injustices in this country; and infringement upon the freedom of speech (82a). During the exhibit "war protest songs" were played on a tape recorder (80a). In exhibiting Morrel's works, he did not intend to be contemptuous of the flag of the United States (82a). He "displayed them because they were works of art, and because [like] all other works of art in the gallery they were for sale" (94a-95a).

One of Morrel's works [depicted in People's Exhibits 3 and 4] was a cross from which protruded the American flag, formed in the likeness of a human penis; tassels at the base of the cross were "probably a decorative or pubic hair" (89a-91a). Church flags and the Panama flag were

draped over the cross's horizontal and vertical pieces. In appellant's opinion, the message imparted by this sculpture was that there is no separation of church and state; that this government is involved in aggressive acts of war. The church flags indicated that the organized church either supports, leads or is being led by acts of aggression (91a). The work was priced at $1200, but was not sold (91a-92a). In his view, the artist was not being disrespectful toward the flag; he thought Morrel questioned the behavior of the government and organized religion in aggressive acts of war (92a).

Another of Morrel's works, which hung in his gallery's window, was made up of an American flag in the form of a body, suspended by a hangman's noose [depicted in People's Exhibits 1, 2, Defendant's Exh. A (49a)]. In the defendant's opinion, this sculpture illustrated Morrel's doubt whether the people of the United States are enjoying their constitutional rights (94a).

Hilton Kramer, art news editor of the *New York Times*, qualified as an expert witness after recounting his background in the field of art (98a-101a). In his opinion, "there is virtually no material which contemporary artists are not applying in some form or other * * * in a work of art" (101a). He "would define a work of visual art as any physical object specifically whose visual properties [are] specifically designed to communicate an aesthetic emotion" (101a); and "anything specifically designed to be a work of art, whether it's poor or high quality, is a work of art" (108a).

In the course of his newspaper responsibilities, Kramer received an announcement [Defendant's Exh. B] of the Morrel exhibit at the Radich Gallery, and in December 1966 he saw the exhibit at the gallery (101a-102a). In accord with his definition of art he considered Morrel's works art, and a "rather feeble" form of protest art (104a-105a, 108a); he also described Morrel's works as "ornamental sculpture" (107a). Though he was aware that Morrel intended to render some anti-war message, no political message was conveyed to him (108a-110a).

Summary of Argument

Appellant Stephen Radich was convicted of committing an "act" by which he cast contempt upon the American flag; he was not convicted for any verbal expression against the government or the flag, or for any expression of opposition to the government or its policies which his act may be deemed to have conveyed. For Radich chose to exhibit publicly in his art gallery certain "constructions" which employed the American flag in a contemptuous manner: One sculpture used the American flag to depict a penis and attached the penis to a cross draped with church flags; another sculpture, in the show window of the gallery visible from the street, used the flag to depict a human body hanging by the neck from a noose.

While Radich considered these items to be protest art, Radich himself had not constructed the items and was not himself seeking to communicate social protest by these works; his interest appeared primarily commercial: to exhibit what he considered art for the purpose of sale, for a commission. And, while the art news editor of the *New*

York Times, a defense witness, considered the items protest art, they conveyed no political message to him.

In any event, the First Amendment does not accord a nonverbal act which seeks to express an idea the same protection afforded a verbal expression of an idea. *Cox* v. *Louisiana,* 379 U.S. 536, 555 (1965); *Adderley* v. *Florida,* 385 U.S. 39 (1966); *United States* v. *O'Brien,* 391 U.S. 367 (1968). The First Amendment protects "speech" and "the press"; an actual flag in the form of a male sexual organ, or a hanging effigy, is neither "speech" nor "the press."

Consequently, since, as we shall demonstrate, there is a "sufficiently important governmental interest" in prohibiting conduct contemptuous of the flag, and since "the governmental interest is unrelated to the suppression of free expression," then—even if the conduct included expressive elements—"incidental limitations" on the latter were justified. *United States* v. *O'Brien, supra,* at 376-7.

That there exists a "sufficiently important governmental interest" in prohibiting conduct that treats the United States flag contemptuously in public was made evident by this Court in *Halter* v. *Nebraska,* 205 U.S. 34, 41-43 (1907), which recognized the public interest in preserving the integrity of the flag as a national symbol of unity and American ideals. This interest is reflected in the laws of Congress and 43 states prohibiting acts that cast contempt upon the flag, and in the remaining seven states forbidding various physical acts against the flag. The flag "is a special kind of personalty." *Street* v. *New York,* 394 U.S. 576, 616-617 (FORTAS, J. dissenting). The public may

prohibit its use as a medium of commercial advertising, or as a subject of open physical disgrace or shame; belonging to all the public, it has been dedicated to other purposes, just as the grounds near a courthouse or jail may be designated off limits for certain conduct, even conduct designed as a protest. See *Adderly* v. *Florida,* 385 U.S. 39, 47-48 (1966); *Cox* v. *Louisiana,* 379 U.S. 559 (1965).

The public interest in preventing public acts that desecrate the flag is especially clear where, as in this case, the dishonored flag is forced upon a captive audience. Appellant displayed the flag as a corpse hanging by the neck in the show window of his gallery facing an important city thoroughfare, for more than three weeks, in a manner calculated to catch the eyes of passers-by indiscriminately. This display collided with the rights of other citizens to use the street undistracted by unavoidable disturbing images of the honored national symbol. Such conduct is an "assault upon individual privacy," subject to reasonable regulation and prohibition. See *Redrup* v. *New York,* 386 U.S. 767, 769 (1967); *Close* v. *Lederle,* 424 F.2d 988 (1st Cir. 1970), *cert. denied* No. 332, Oct. Term, 1970; *People* v. *Stover,* 12 N.Y.2d 462 (1963), *appeal dismissed* 375 U.S. 42 (1962); *Kovacs* v. *Cooper,* 336 U.S. 77 (1949).

In addition, as the New York Court of Appeals held, the flag desecration statute promotes the important governmental interest of preventing "the outbreak of * * * violence by discouraging contemptuous and insulting treatment of the flag in public." See also *Halter* v. *Nebraska,* 205 U.S. 41-43 (1907); *People* v. *Street,* 20 N.Y.2d 231, 236 (1967), *rev'd on other gds.* 394 U.S. 576 (1969); *People* v. *Cowgill,* 274 Cal. App. 174, 78 Cal. Rptr. 853 (Cal. Super.

1969), *appeal dismissed,* 396 U.S. 371 (1970). That no actual violence may occur in a particular case, such as the present one, is a fortuitous circumstance that hardly negates the proposition that contemptuous use of the flag in public can be the occasion for violence and that the state may proscribe conduct that potentially breeds disorder without waiting until the violence erupts.

The governmental purposes envisioned by the statute are "unrelated to the suppression of free expression." Acts contemptuous of the flag are punishable regardless whether they are designed to express views, just as destruction of draft cards is punishable regardless whether the destruction was "engaged in for the purpose of expressing views." *United States* v. *O'Brien, supra,* at 375. The instant statute is neutral as to political expression—a disappointed "hawk" expressing by similar uses of the flag his contempt for American appeasement of "international communism" would also be covered by the statute. The law is aimed not at ideas, but at conduct; when it is applied to expressive conduct, it is applied not to ideas, but to the method of expressing them. Thus, the criminal complaint in this case, and the People's evidence, made no mention of expression or political views; only conduct was referred to. The "expressive" qualities alleged were brought out by appellant as a matter of defense. *Compare Street* v. *New York,* 394 U.S. 576 (1969). And, while acts contemptuous of the flag are justifiably prohibited, the citizen remains free verbally "to express publicly [his] opinions about our flag [or the draft], including those opinions which are defiant or contemptuous." *Street* v. *New York, supra,* at 593. Accordingly, the statute is distinguishable from those statutes or

administrative regulations whose object was either to suppress communication [*Stromberg* v. *California,* 283 U.S. 359 (1931) (prohibiting people from expressing their opposition to government by the display of a red flag); *Tinker* v. *Des Moines,* 393 U.S. 503 (1969) (prohibiting students from expressing their opposition to the Vietnam war by the wearing of black arm bands); *Schacht* v. *United States,* 398 U.S. 58 (1970) (prohibiting people from "speaking out against the role of our Army and our country in Vietnam")] or to "compel" an individual "to utter what is not in his mind." *West Virginia* v. *Barnette,* 319 U.S. 624, 634 (1943) (compulsory flag salute).

Further, that the statute prohibiting casting contempt upon the flag is not unconstitutionally vague, and that the exhibited works fall within the statutory proscriptions, cannot be doubted. A criminal statute is not void for vagueness if "men of common intelligence" are not "required to guess at the meaning of the enactment." *Winters* v. *New York,* 333 U.S. 507, 515 (1948). Fair, reasonable notice of the acts proscribed in terms readily understandable by men of average intelligence is required, not mathematical precision. Thus, men of ordinary intelligence would be able to understand what conduct "casts contempt" upon the American flag. This Court has often upheld language no more precise. See, *e.g., Beauharnais* v. *Illinois,* 343 U.S. 250 (1950) (group libel by exposure to "contempt, derision, or obloquy"); *Roth* v. *United States,* 354 U.S. 476, 491-492 (1957) ("obscene"); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942) (concept of fighting words).

Another dispositive answer to appellant's allegation of vagueness is that it "is as clear as a pikestaff" that hang-

ing the American flag as a body and using it to form a male sexual organ emerged from pubic hair (91a) cast contempt on the flag; therefore, appellant may not be heard to complain that he was deprived of fair notice as to the meaning of the statute. *Williams* v. *United States,* 341 U.S. 97, 101, 104 (1951). Similarly, he may not complain, for the first time in this Court, that the statute might be applied to persons other than himself, whose conduct, such as unorthodox gestures toward the flag, may be constitutionally protected. The validity of the application of the statute to Radich does not depend upon validity of application in every hypothetical situation that the mind can conceive of, particularly since the New York appellate courts have not been called upon to determine whether the statute applies in those situations.

The knowing display of such objects need not be excused because the exhibitor's specific intent is other than contemptuous. The statute is properly malum prohibitum; the defendant is held to the natural consequences of his deliberate, knowing act of exhibiting items whose subject he was aware of and which were found contemptuous of the flag. In *Smith* v. *California,* 361 U.S. 147 (1959), upon which appellant relies, the state was prohibited from punishing a proprietor of a bookstore for exhibiting items whose subject matter he was unaware of. If the bookseller had been aware of the contents of the items, his subjective opinion that they were not obscene would have been immaterial.

Radich also alleges that the statute denies him equal protection, based on his erroneous reading of an exception contained in the statute for "ornamental pictures," and

newspapers and periodicals. Radich argues that this provision denies equal protection to sculptors and exhibitors of sculpture since it forbids him to use the flag contemptuously on ornamental sculpture, while permitting contemptuous use in other media. However, read in the context of the entire statute, the major portion of which seeks to prohibit the use of the flag in advertisements, it is quite clear that the exception is intended to permit only non-contemptuous use of the flag for certain purposes, when such use is "disconnected and apart from any advertisement," and legislative distinctions between contemptuous and non-contemptuous use of the flag do not result in a denial of equal protection. *See Halter* v. *Nebraska, supra.* Since Radich has been convicted of using the flag contemptuously, the exemption provision, properly construed, is not even here in issue.

POINT I

Conduct that publicly casts contempt upon the American flag by physical use of the flag is not protected by the First Amendment.

Appellant Stephen Radich was convicted of "acts" that publicly "cast contempt" upon the flag of the United States, under a statute providing that no person shall "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon" the American flag, "either by word or act." Former N.Y. PENAL LAW §1425(16)(d), now N.Y. GEN. BUS. LAW §136(d). Although the criminal complaint filed against appellant, in setting forth the statute as a matter of form, included the term "word" as well as "act" (2a), he was prosecuted and convicted not for words, but for

publicly displaying constructions that misused the flag contemptuously. No words were alleged in the complaint, the charges being confined to his display of three-dimensional objects (2a-3a), and words formed no part of the People's evidence, although the defense evidence included reference to protest songs that were broadcast in the gallery during the exhibition. The opinion of the trial court, reflecting its findings of fact, limited culpability to the "constructions" (27a). Violation of the statute was found in the presentation in the display window facing Madison Avenue of "an American flag stuffed and shaped in a form suggesting a human body hanging from a yellow noose around its neck" (25a; Peo's Exhs. 1, 2; 41a-42a; Def's Exh. A; 49a). Among the 12 other constructions, inside the gallery, the trial court singled out the one displaying an American flag in the form of an erect penis protruding from the vertical standard of a cross (25a; Peo's Exhs. 3, 4, 42a). The finders of fact found "that these so-called 'constructions' constitute a contemptuous use of the flag of the United States and that the defendant by exhibiting them to the public cast contempt upon it in violation of paragraph (d) of the statute" (27a). The New York Court of Appeals upheld this finding, stating:

> "Whether defendant thinks so or not, a reasonable man would consider the wrapping of a phallic symbol with the flag an act of dishonor; he would consider the hanging effigy a dishonor; and to a lesser and more debatable extent it might be found that wrapping the flag in chains, attaching it to a gas meter, and fashioning the other representations involved, were acts dishonoring the flag. The exhibitor who, as in this case, engages to join the artist in the commercial exploita-

tion of the supposed expression of protest stands in no better position" (15a).

In *Street* v. *New York*, 394 U.S. 576 (1969), this Court left open the question whether the First Amendment permitted a prosecution for such conduct, the Court merely declaring that freedom of speech barred a conviction for casting contempt upon the flag by "word."

Appellant's attack on the constitutionality of the "act" provision draws into question not only the New York statute, which originated in 1899, but laws in all of the other states prohibiting desecration of the flag, and a recently enacted law of Congress making it a crime to knowingly "cast contempt" upon the United States flag by publicly mutilating, defacing, burning, or trampling upon it. 18 U.S.C. §700 (Supp. IV 1968). The federal legislation specifically does not pre-empt state legislation in the field. 18 U.S.C. §700(c). In 40 states, laws prohibit casting contempt upon the American flag by act; and laws in three other states, without using the word "contempt" or "contemptuous," prohibit conduct dishonoring the flag. The remaining seven states prohibit various specified physical acts against the flag.* One purpose of these laws is to preserve the integrity of the flag as a symbol of national unity under the Constitution.** The second purpose is to prevent

* Note, *Flag and the Law*, 4 VALPARAISO U. L. REV. 345, 362-367 (1970); *Desecration of the Flag, Hearings on H.R. 271 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 1st Sess., ser. 4*, 324-346 (1967).

** Ch. 54 [1917] Laws of N.Y. 106 (caption); 1943 Rep. of Att'y Gen. 90-91, 1941 Rep. of N.Y. Att'y Gen. 465, 51 N.Y.S. Dept. Rep. 240 (1934); Brief of N.Y. Att'y Gen. at 3, 4, *Street* v. *New York*, 394 U.S. 576 (1969); *Joyce* v. *United States*, 259 A2d 363 (D.C.App. 1969); *Hoffman* v. *United States*, 256 A2d 567 (D.C. App. 1969); *United States* v. *Ferguson*, 302 F.Supp. 1111 (N.D.Cal. 1969); see *Halter* v. *Nebraska*, 205 U.S. 34, 41-43 (1907).

the potential of public disorder occasioned by public displays of contempt toward a widely revered national symbol.*

Appellant's primary contention is that his conviction and the New York statute violate the First Amendment guarantee of freedom of speech. In reviewing such positions, this Court has distinguished "conduct" and "pure speech"; in this case we deal "not with free speech alone," but at most with "expression mixed with particular conduct." See *Cox* v. *Louisiana,* 379 U.S. 559, 564 (1965). Appellant's unsupported assertion that this case involves "pure speech" entitled to "maximum constitutional protection," and is governed by *Street* v. *New York,* is without merit (Brief for Appellant, p. 13, n.6). *Street* dealt with the "words" portion of the statute. And as this Court said in *United States* v. *O'Brien,* 391 U.S. 367, 376 (1968), "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech,' " even when "the person engaging in the conduct intends thereby to express an idea." Appellant's displaying of actual flags in the form of a male sexual organ and a dead body hanging by the neck was not "speech." Whatever communicative elements it may have had, the non-verbal elements were substantial, indeed overpowering—physical alteration, and the display of altered flags, propped with pulleys, ropes, and hung in a window and upon the floor. These displays, like the displays of armbands in *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969), were at most "symbolic acts." *Id.* at 505.

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* 9a-11a; *People* v. *Street,* 20 N.Y.2d 231 (1967), *rev'd,* 394 U.S. 576 (1969); *People* v. *Cowgill,* 274 Cal. App. 174, 78 Cal. Rptr. 853 (Cal. Super. 1969), *appeal dismissed,* 396 U.S. 371 (1970); *Halter* v. *Nebraska,* 205 U.S. 34, 41 (1907).

Reasonable regulation of symbolic acts or symbolic conduct is permissible under the First Amendment, "even though intertwined with expression." *Cox* v. *Louisiana, supra* at 563. A recent formulation of this principle appeared in *United States* v. *O'Brien, supra*:

> "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms * * * [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."

Id. at 376-377; see also *Street* v. *New York,* 394 U.S. 576, 594-617 (1969) (dissenting opinions); *Tinker* v. *Des Moines School District, supra; Adderly* v. *Florida,* 385 U.S. 39 (1966); *Cox* v. *Louisiana, supra; Kovacs* v. *Cooper,* 336 U.S. 77 (1949). This case, we shall show, involves minimal expression, important public interests, and minimal, politically neutral limitations on expression, permitting reasonably adequate alternative means of communication.

The absence of an appreciable "expression" affected by the conviction of appellant is demonstrated by his candid concession at the trial that his interest in displaying the constructions was commercial, not political. Although appellant never claimed that he wished to convey political or social ideas or assist the artist, Marc Morrel, in that pur-

pose, his brief in this Court is written as if he were the artist. At trial he merely testified to his opinions about the artist's intention to express certain protests (82a, 91a-93a), but when asked by the court his purpose in displaying the constructions, he stated, "I displayed them because they were works of art and because [like] all other works of art in the gallery they were for sale" (94a-95a; see also 80a, 83a). The existence of a commercial rather than a political or social motive is relevant in assessing the validity of the application of a law to communications. *Valentine* v. *Chrestenson,* 316 U.S. 52 (1942) (commercial handbills distributed in the street; political text added as an evasion); *Breard* v. *Alexandria,* 341 U.S. 622, 641-645 (1951) (prohibition of door-to-door soliciting validly applied to salesmen of magazine subscriptions). Although a commercial intent is not always material when pure speech or freedom of the press is involved [see *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *Bantam Books* v. *Sullivan,* 372 U.S. 58, 64 n.6 (1963)], this case involves symbolic acts at most, not pure speech, and the actor's lack of an expressive purpose may be considered in assessing the expressiveness of his conduct and his claim to First Amendment protection.

Nor do the constructions, by themselves, convey a determinable thought or idea. Like the flag shirt in *People* v. *Cowgill,* 274 Cal. App. 174, 78 Cal. Reptr. 853 (Cal. Super. 1969), they display no "recognizable communicative aspect" of substance. See *Cowgill* v. *California,* 396 U.S. 371 (1970) (concurring opinion). Although this Court has not announced a test of the sufficiency of the communicative or expressive aspect of a course of conduct that would warrant application of the First Amendment, the Court has re-

jected a subjective test, based on the intent of the actor. *United States* v. *O'Brien, supra* at 376. We suggest an objective test: conduct has no sufficient communicative aspect warranting application of the First Amendment unless a reasonable man, reasonably well-informed, would understand its meaning—its alleged "speech" element—in the context in which it occurs. Thus, burning of a draft card publicly would bring into play the First Amendment [*cf. United States* v. *O'Brien, supra* at 376]; similarly, First Amendment principles did apply to the black armbands worn by the students in *Tinker,* since a reasonably well-informed member of the school community would have understood this as a gesture of protest against the Vietnam war. But in the present case even an unusually well-informed man, appellant's expert witness—the art news editor of the *New York Times,* formerly the art critic for the *New Leader,* a magazine of political and social commentary (98a)—saw no discernible political or social comment in the constructions (105a, 108a, 109a, 110a). While he concluded that the artist "probably intended to convey a political message," he was assisted in this inference by the anti-war songs playing on the sound track (109a). As to the construction hung in the display window —facing passers-by who were unaided by the sound track—the art critic "didn't take the work of art to be one that communicated a message exactly" (108a).

While the expression affected in this case was "minimal" (*cf.* 108a), the governmental interests served by the New York statute are important. Laws prohibiting public contemptuous treatment of the flag of the United States protect the integrity of the flag as a national symbol, "the emblem of our unity, our power, our thought and purpose

as a nation."* Perhaps this was the "major motivating factor" that the New York Court of Appeals alluded to in its opinion in this case (9a). As Mr. Justice FORTAS said in *Street* v. *New York*, 394 U.S. 576 (1969), "the flag is a special kind of personalty."

> "Its use is traditionally and universally subject to special rules and regulations. As early as 1907, this Court affirmed the constitutionality of a state statute making it a crime to use a representation of the United States flag for purposes of advertising. *Halter* v. *Nebraska*, 205 U.S. 34 (1907). Statutes prescribe how the flag may be displayed; how it may lawfully be disposed of; when, how and for what purposes it may and may not be used. See, *e.g.*, 4 U.S.C. §3; 56 Stat. 377, c. 435, 36 U.S.C. §§172-177. A person may 'own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property in a sense; but it is property burdened with peculiar obligations and restrictions." *Id.* at 616-617 (dissenting opinion).

Just as the grounds of a jail or the area near a courthouse may be declared off limits for protest [*Adderly* v. *Florida*, 385 U.S. 39, 47-48 (1966); *Cox* v. *Louisiana*, 379 U.S. 559 (1965)], so may the national flag; it has been "dedicated to other purposes" by the people. *Cf. Brown* v. *Louisiana*, 383 U.S. 131, 166 (1966) (BLACK, J., dissenting). It is the national trademark, not a private brand [*cf. Halter* v.

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* Woodrow Wilson, Flag Day address, June 14, 1917, quoted in QUAIFE, THE FLAG OF THE UNITED STATES 193 (1942); see also *Halter* v. *Nebraska*, 205 U.S. 34, 41-43 (1907); Lafayette, letter to John Adams (1786), quoted in 2 PREBLE, ORIGIN AND HISTORY OF THE AMERICAN FLAG, preface (1917); 4 ABRAHAM LINCOLN, COLLECTED WORKS 192, 219-220 (Basler ed. 1953); Francis Scott Key, The Star Spangled Banner, Henry Ward Beecher, address (1861), Ralph Waldo Emerson, Concord Hymn, collected in OUR FLAG (Schauffler ed. 1926); Holmes, C.J., Remarks, 178 Mass. 627 (1901); 36 U.S.C. §170.

Nebraska, supra at 39; 15 U.S.C. §1052(b)], and the public may restrict its use as a medium of commercial advertising or a physical target of disgrace or shame. It is national, and belongs to all the public.* Protection of this interest

* In an editorial on the most recent Flag Day, the *New York Times* stated:

> *"Thirty years ago today the conquering armies of the most powerful military dictatorship the world had ever known were sweeping through Western Europe under the hooked cross and blood-red banner of Nazi Germany. The flags of Norway, Denmark and the low countries had already been struck. On this very day in 1940 the swastika was for the first time unfurled atop the Eiffel Tower. The Battle of Britain was about to begin.*
>
> *"The American people were watching apprehensively, with every passing day of Nazi triumph, increasingly conscious of what our own democracy and our own flag meant to us. It was in this spirit and this atmosphere that Robert L. Duffus of the editorial board of The New York Times wrote the small classic reprinted below, which first appeared on this page on Flag Day, 1940.*
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> * * *
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> "'It is stories told. It is the Pilgrims dying in their first dreadful winter. It is the Minuteman standing his ground at Concord Bridge, and dying there. It is the Army in rags, sick, freezing, starving at Valley Forge. It is the wagons and the men on foot going westward over Cumberland Gap, floating down the great rivers, rolling over the great plains. It is the settler hacking fiercely at the primeval forest on his new, his own lands. It is Thoreau at Walden Pond, Lincoln at Cooper Union, and Lee riding home from Appomattox. It is corruption and disgrace, answered always by men who would not let the flag lie in the dust, who have stood up in every generation to fight for the old ideals and the old rights, at risk of ruin or of life itself.
>
> "'It is a great multitude of people on pilgrimage, common and ordinary people, charged with the usual human failings, yet filled with such a hope as never caught the imaginations and the hearts of any nation on earth before. The hope of liberty. The hope of justice. The hope of a land in which a man can stand straight, without fear, without rancor.
>
> "'The land and the people and the flag—the land a continent, the people of every race, the flag a symbol of what humanity may aspire to when the wars are over and the barriers are down; to these each generation must be dedicated and con-

is not limited to Congress, but may be offered by the states, which are "indissolubly connected" with the Union. *Halter* v. *Nebraska,* 205 U.S. 34, 43 (1907). Thus, in *Street* v. *New York,* four members of this Court indicated that "the States and the Federal Government do haye the power to protect the flag from acts of desecration and disgrace." See 394 U.S. at 605 (WARREN, C.J., dissenting).

Such protection is not, as appellant contends, "compelling veneration" of the flag (Brief for Appellant, p. 14), any more than laws prohibiting mutilation of draft cards, coins or paper currency [see 18 U.S.C. §§331, 333] compel "veneration" of those objects. This case is distinguishable from *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624 (1943), which held that a state may not compel a salute to the flag. *Barnette* involved "compulsion of students to declare a belief" [*id.* at 633]; the flag desecration law at issue leaves appellant free to refrain from conduct and affirmation of belief, and allows him to speak

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secrated anew, to defend with life itself, if need be, but, above all, in friendliness, in hope, in courage, to live for.'

* * *

"This was the meaning of the flag thirty years ago; this is the meaning of the flag today. But it is a measure of the bitter divisions of the era in which we live that the symbolism of that flag should have become distorted and degraded by the partisan extremists of both New Left and Old Right. The flag must not be captured either by the repressive legions of the right who employ it daily to prove they are for Agnew and against the students; nor must its meaning be destroyed by the frustrated demagogues of the left who find a cheap and easy outlet by reviling it and dragging it in the dust. The flag is a symbol of the unity of America. We must not allow it to be perverted by the forces of disunity, whether the Birchers or Weathermen, that today are abroad in this land." N.Y. Times, June 14, 1970, p. 16, col. 1 (Emphasis in original).

contemptuously of the flag. He merely must abstain from publicly desecrating it.

The governmental interest in preserving the integrity of this emblem is particularly strong where, as in this case, the disgraced flag is thrust upon a captive audience. This Court has rejected "the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Adderly* v. *Florida,* 385 U.S. 39, 47-48 (1966). For more than three weeks (78a), Radich displayed the flag as a cadaver hung by the neck, in the window of his gallery facing a busy city street, in a manner designed to draw the attention of passing pedestrians, motorists and bus passengers (Peo's Exhs. 1, 2, Def's Exh. A). The effigy was evidently calculated to shock the viewer; surely it was offensive to many passers-by. Appellant's alleged right to present an artist's symbolic protest conflicted with the rights of others, adults and children, to use the street undistracted by an eye-catching, unavoidable image, larger than life, of the respected symbol of America hanging like a corpse.

As the Court of Appeals suggested, the range of this brightly colored display on the second floor of the building was greater than that of a sidewalk speaker (9a-10a), whose harangue can be avoided by crossing the street or walking in a wide arc around the soapbox. To respecters of the flag, or citizens for whom it had special significance, perhaps because of the loss of a relative in the Armed Forces, or of an honored national leader, the harm was instantaneous, inflicted as soon as the effigy was seen. Regulation of such displays does not infringe freedom of speech. As has been said in a similar context:

> "Where a shock effect is produced by forcing an 'obscene' communication upon a person contrary to his wishes, the issue is somewhat similar to that involved in private defamation. The harm is direct, immediate and not controllable by regulating subsequent action. The conduct can realistically be considered an 'assault' on the other person, and hence placed within the category of 'action.' Issues of this sort arise, of course, only in limited situations such as where the communication is displayed publicly on a billboard, or sent into a private home through the mail. Regulations can be devised to deal with this matter that do not create serious administrative problems. Under the circumstances, restriction of communications of this nature would not be inconsistent with the first amendment." Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-939 (1963).

This sound rationale was applied in *Close* v. *Lederle*, 424 F.2d 988 (1st Cir. 1970), *cert. denied*, —— U.S. ——, No. 332, Oct. Term 1970, to uphold the removal of an art instructor's paintings from the walls of a corridor of a university building, although the art was not legally obscene. It depicted male or female nudes displaying the genitalia in clinical detail, and bore cheap titles. "Where there was, in effect, a captive audience," including children who regularly used the corridor, the school authorities "had a right to afford protection against 'assault upon individual privacy,' *see Redrup* v. *New York*, 1967, 386 U.S. 767, 769 * * *"* In *People* v. *Stover*, 12 N.Y.2d 462 (1963), *appeal dismissed*, 375 U.S. 42 (1963), this Court found no substan-

* In *Redrup* the Court spoke of "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. *Cf. Breard* v. *Alexandria*, 341 U.S. 622; *Public Utilities Commission* v. *Pollak*, 343 U.S. 451."

tial federal question raised by the application of an ordinance, prohibiting the maintenance of a clothesline in a yard abutting a street, to appellants' clothesline filled with old clothes and rags, which they displayed as a peaceful protest against the high taxes imposed by the town. Judge FULD had noted that the ordinance, apparently passed in response to appellants' flamboyant protest, was validly "designed to proscribe conduct which offends the sensibilities." 12 NY2d at 470. The rule that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers" [see *Bachellar* v. *Maryland*, 397 U.S. 564, 567 (1970)] has no application to such a case, or to Radich's. Here, as in *Stover*, "any shock effect caused" was attributable not to "the content of the ideas being expressed" [*ibid.*]—it is doubtful that any "ideas" were conveyed to the average passerby—but to the method of expressing them. Similarly, in the interest of protecting individual privacy from verbal assaults, *Kovacs* v. *Cooper*, 336 U.S. 77, 81, 86-89 (1949) upheld a prohibition against loudspeakers emitting "loud and raucous noises," even as applied to political messages. This approach does not impair freedom of expression. Appellant "may express his opinions," or Marc Morrel's, "on controversial subjects like the conflict in Vietnam, if he does so * * * without colliding with the rights of others." See *Tinker* v. *Des Moines School District*, 393 U.S. 503, 513 (1969); see also *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 630 (1943).

Thus, the application of the statute to the display in the show window is clearly consistent with the First Amendment. Nor is appellant's conviction vitiated

because the statute does not expressly limit its coverage to contemptuous conduct before a captive audience. First, as is discussed throughout this brief, the legislation may validly be applied to public contempt even before a voluntary audience.

Even if the First Amendment were deemed to preclude the application of the statute to conduct before a voluntary audience, the conviction still would survive. The findings of the trial court and of the Court of Appeals show that the effigy in the window was a separate basis of the conviction (9a, 15a, 25a, 27a); in *Street* v. *New York*, by contrast, the generality of the complaint, of the People's evidence, and of the verdict led this Court to conclude that the verdict might have been based upon constitutionally protected behavior, the defendant's words. Moreover, the statute did not have to specify the theory of unwilling audience. The trespass statute in *Adderly* v. *Florida*, 385 U.S. 39 (1966), was validly applied to non-violent protests on jail grounds, even though it was not limited in terms to such property. See also *United States* v. *Petrillo*, 332 U.S. 1, 212 (1947). In many situations where the First Amendment is applicable, the statute may be validly applied if certain facts obtain, even though the statute does not specify these constitutional conditions for prosecution. See *Ginzburg* v. *United States*, 383 U.S. 463 (1966) (evidence of pandering in obscenity prosecution); *Dennis* v. *United States*, 341 U.S. 494, 513-515 (1951) (in prosecution for conspiracy to advocate violent overthrow, clear and present danger test is not an element of the crime, but a "judicial measure of constitutional applicability," which the trial court alone may rule on).

Not only is there an important public interest in preserving the flag as a national symbol, free from public disgrace, but this interest is "unrelated to the suppression of free expression," and "the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." See *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). While the flag is to be preserved, and is off limits for disgracing acts, no topic is proscribed; the regulation is unrelated to "the prohibition of expression of one particular opinion." Compare *Tinker* v. *Des Moines School District, supra* at 511. Although appellant's argument associates contemptuous misuse of the flag specifically with the expression of sentiment against the Vietnam war, the statute by its terms conveys no such meaning. It is an accident of history that in some quarters the flag currently brings to mind a hawkish position on a war, or right-wing politics. But the statute was enacted long before these controversies arose. It is neutral on political matters, like the flag. A disappointed hawk, expressing by a lynched flag, or a drooping flag-penis, his protest against American troop withdrawals, bombing halts, ceasefires or truces (all of which occurred or were contemplated in the fall of 1966, shortly before appellant's exhibition),* would also be violating the statute.

Pure free-floating "contempt," the subject of the statute, is "expression" in a broad sense, but not in the sense contemplated by the First Amendment; notwithstanding its recurrent use as a medium of political expression, "there is nothing necessarily expressive about such conduct." See

* *N.Y. Times*, Oct. 1, 1966, p. 1, col. 2, Oct. 23, p. 1, col. 1, Oct. 26, p. 1, col. 1, Nov. 24, p. 1, col. 1, Nov. 27, p. 1, col. 8, Dec. 14, p. 1, col. 7.

United States v. *O'Brien, supra* at 376. Indeed, knowingly destroying or mutilating a draft card shows contempt for the draft system, but the statute prohibiting such willful conduct is unrelated to the suppression of "expression" in terms of the First Amendment. *Ibid.* Similarly, public desecration of the flag, unless explained, conveys no particular meaning. If it is explained as a protest, the violation of the flag is merely incidental to the thought conveyed, and is simply an act dramatizing it. But the statute applies to the "act," not the explanation. Thus, hanging a flag covered with paint out of a window facing a public street, as occurred in *People* v. *Verch*, 63 Misc.2d 477 (Ct. Spec. Sess. 1970), may cast contempt on it, but no communicative aspect inheres in the act alone. Prosecutions under the flag desecration law would properly be aimed at the non-expressive, physical elements of this conduct.

In *Stromberg* v. *California*, 283 U.S. 359 (1931), on the other hand, the statute prohibited the display of a red flag for the purpose of expressing opposition to organized governments; whatever governmental interest was furthered by this law, it was directly related by the statutory terms to the suppression of free expression. The same is true of *Schacht* v. *United States*, 398 U.S. 58 (1970). The statute there permitted use of an American military uniform only in a theatrical performance, "if the portrayal does not tend to discredit" the Armed Service. The supposed governmental interest furthered by this law inherently involved the suppression of pure speech; Congress "in effect made it a crime for an actor wearing a military uniform to say things during his performance critical of the conduct or policies of the Armed Forces." *Id.* at 62-63. Moreover,

there is no valid governmental interest in protecting the military services from discredit.

The second governmental interest served by the statute —the purpose discussed by the New York Court of Appeals (9a)—is the prevention of breaches of the peace.

> "[I]t is within the realm of legislative judgment to find that some types of public flag desecration will be as provocative to many viewers as the kind of personal insult which is often followed by violence. That the state has a substantial interest in preventing a resulting breach of the peace and that the police power is the proper foundation for legislation directly toward that end is well settled doctrine." *Crosson* v. *Silver*, —— F.Supp. ——, No. Civil 70-79 Tucson (D.Ariz. Nov. 13, 1970).

And as Chief Judge FULD stated in *Street*, "Violation of the statute may not be condoned * * * because no violence actually did occur." 20 N.Y.2d at 237. Comparing the present case to *Street*, the Court of Appeals found:

> "Here, the expression, if less dramatic, was given far wider public circulation and, in consequence, perhaps, a measurable enhancement of the likelihood of incitement to disorder, by the placement of one of the constructions in a display window of defendant's gallery on Madison Avenue in the City of New York, and the exhibition and exposure for sale of the companion pieces in the public gallery and mercantile establishment within. Implicit in the invitation to view was the opportunity thereby afforded to join in the protest, or in counter-protest, with the consequent potential of public disorder; or so the trier of facts could properly find" (9a-10a).

The triers of the facts did find evidence of a threat to public order:

"In *Halter* v. *Nebraska*, 205 U.S. 34, 41, the Supreme Court, in upholding a statute similar to that involved here as applied to the use of the flag in advertising said:

> 'From the earliest period in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. * * * Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.'

It seems to us that the prohibited use of the flag in advertising is less a desecration and therefore less of a threat to public order than the use and exhibition of it in the so-called 'constructions' here involved" (29a).

Appellant contends that the state courts have ruled in effect that casting contempt on the flag in public "creates an irrebuttable presumption that a breach of the peace will follow" (Brief for Appellant, p. 16). In so urging, appellant ignores the other governmental interest protected by the statute, preservation of the flag as a national symbol. Moreover, the contention is unsound even as to the interest of preventing a breach of the peace. As to this, the statute at most reflects a reasonable presumption that a breach of the peace is likely to follow acts that cast contempt on the flag in public. The reasonableness of this expectation is reflected in the enactment of similar laws throughout the country, and it was expressed by this Court in *Halter* v. *Nebraska*. See also *People* v. *Cowgill*, 274 Cal. App. 174, 78 Cal. Rptr. 853 (Cal. Super. 1969), *appeal dismissed*, 396 U.S. 371 (1970). *Street* v. *New York* is not to the contrary, since the opinion in that case dealt with culpability for

words, not merely physical desecration of the flag in public. No doubt, many New Yorkers could resist even "fighting words" [*cf. Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942)], just as they resisted appellant's display. But the expectation of danger from his indiscriminate display on Madison Avenue to a large, undifferentiated, audience for three continuous weeks is reasonable. Indeed, disturbances in the Wall Street and City Hall areas of Manhattan this spring, associated with allegations of mistreatment of the flag, illustrate the provocative quality of such conduct.* Except for showing that no breach of the peace actually occurred, appellant made no offer to rebut the reasonableness of this expectation. In *Cox* v. *Louisiana,* 379 U.S. 559 (1965), this Court, in holding that the First Amendment did not protect orderly picketing near a courthouse with intent to impede the administration of justice, upheld "a legislative determination based on experience that such conduct inherently threatens the judicial process' [*id.* at 566], even though no evidence of a breach of the peace or a threat to the judicial process was introduced at the trial.

Appellant argues that acceptance of the breach-of-the-peace interest justifies a "heckler's veto," but he misses the point. The interest is to prevent disorderly reaction not to ideas or views expressed, but to physical acts themselves, regardless of the views of the actor; that these contemptuous uses of the flag may have communicative aspects is no bar to legislation directed at the acts. The "state interest in preventing breaches of the peace is, in the flag desecration context, unrelated to the suppression

* *Cf.* "Indict Wall St. Hardhat," N.Y. *Post,* May 22, 1970, p. 1, col. 3; N.Y. *Daily News,* May 9, 1970 (centerfold); *N.Y. Times,* May 12, 1970, p. 18, col. 2.

of free expression. The interest is affected, not by the speech element of the conduct," but by the emotional impact of the "non speech element." *Crosson* v. *Silver*, —— F.Supp. ——, No. Civil 70-79 Tucson (D.Ariz. Nov. 13, 1970). Moreover, the incidental restriction on the alleged communicative value of the act is no greater than essential to further that interest, in view of the reasonable legislative determination that such conduct inherently risks disorder. Therefore, the holding in *Crosson* v. *Silver, supra,* that the Uniform Law against flag desecration, which has been enacted in New York and 28 other states [note, *Flag and the Law,* 4 VALPARAISO L. REV. 345, 361-367 (1970)], is unconstitutional because not expressly limited to desecrations that tend to cause breaches of the peace, is incorrect; indeed, the logical outcome of this holding is that all state and federal laws against publicly mutilating or trampling upon the flag are void. Such cavalier rejection of the public interest is unjustified.

Disturbing physical acts such as these, and the displays in the case at bar, are closely akin to the "insulting or 'fighting' words" [*Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942)], "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Such utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution * * *' " *Id.* at 571-572. A flag-corpse and a flag-phallus publicly flaunted are "epi-

thets," not in any proper sense "communication of information or opinion safeguarded by the Constitution." Unlike speech, they do not appeal "to good sense and to 'the power of reason, as applied through public discussion.'" See *Garner* v. *Louisiana,* 368 U.S. 157, 201 (1961) (HARLAN, J. concurring). They "inflict injury" without peaceful recourse.

Contrary to the implications of the briefs filed by appellant and *amici curiae,* artists have no favored position under the First Amendment. The framers of the First Amendment, men of extraordinary learning and culture, wrote not of art but of speech. That the statute has been applied to works of art in this case is relevant only in determining whether the contemptuous acts in question had communicative elements that bring the First Amendment into play. Under narrow circumstances, art may be limited by government, incidental to the protection of interests unrelated to the suppression of expression. Thus, it does not further the discussion to complain, as *amici* have, that "If the conviction below is upheld by this Court, the traditional practice of artists expressing themselves on controversial subjects through materials and symbols appropriate to the subject, will be limited" (Brief of *Amici Curiae,* p. 8). An artist may not, to protest war, make a collage of mutilated draft cards, or, in the manner of Gulley Jimson, use the base of the Washington Monument for a mural,* however "appropriate" these materials would be to the subject. Nor may they publicly desecrate the American flag, although they may use it otherwise (see Brief of *Amici Curiae* at Appendix). Such limitations, however, are mini-

* *Cf.* JOYCE CARY, THE HORSE'S MOUTH.

mal. Creative artists have other means to express protest, means that do not conflict with the rights of others to free enjoyment of the national symbol in an orderly atmosphere.

POINT II

The flag statute is not void for vagueness or overbreadth.

Appellant, convicted under a statute that makes it a crime to "publicly * * * cast contempt upon" the American flag by an "act," attacks the phrase "cast contempt" as unconstitutionally vague from two standpoints; first, that it does not give fair notice of the conduct condemned, and second, that it encompasses acts that are protected by the First Amendment and is thus impermissibly overbroad.

A criminal statute is not void for lack of an ascertainable standard of guilt if "men of common intelligence" are not "required to guess at the meaning of the enactment." *Winters* v. *New York*, 333 U.S. 507, 515 (1948); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Fair, reasonable notice of the forbidden acts in terms that permit a man of average intelligence to "reasonably understand that his contemplated conduct is proscribed" is all that is required. *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32-3 (1963); *Roth* v. *United States*, 354 U.S. 476, 491-2 (1957). "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *Roth* v. *United States, supra; United States* v. *National Dairy Corp., supra; United States* v. *Harriss*, 347

U.S. 612, 618 (1954). For, "whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." *United States* v. *Wurzbach,* 280 U.S. 396, 399 (1930); *Nash* v. *United States,* 229 U.S. 373, 377 (1913).

In the instant case, due regard for the intelligence of a reasonable man requires accepting his ability to discern acts contemptuous of a person or thing. Simply understood, an act will "cast contempt" upon the flag when it is apparent to a reasonable man under the circumstances surrounding the commission of the act—for example, mutilation—that the flag is the object of scorn, shame, dishonor, or disgrace, or presented as low, vile, or worthless. *See,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged (1969); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, College Edition (1968); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969).

Appellant's argument that the term is ambiguous because persons who hold political beliefs allegedly represented by the flag mutilations in question would find them not contemptuous, completely misses its mark. Contemptuousness can hardly be judged by the persons who espouse the particular use that is the subject of such a determination. Contemptuousness is here judged by the eye of a reasonable man, regardless of political beliefs. That different juries may reach opposite conclusions as to the same act does not make the statute imprecise; "it is

common experience that different juries may reach different results under any criminal statute." *Roth* v. *United States, supra,* 354 U.S. 476, 492 n. (1957). Although the reasonable man must exercise his judgment on the factual question of contempt, that does not of itself create ambiguity; a determination of contemptuousness is no greater a challenge than, for example, a determination of conduct as reasonable or unreasonable. *See, United States* v. *Ragen,* 314 U.S. 513, 523 (1942); *Adderly* v. *Florida,* 385 U.S. 39, 42-3 (1966); *United States* v. *National Dairy Corp.,* 372 U.S. 29, 32-3 (1963); *Cameron* v. *Johnson,* 390 U.S. 611, 616 (1968). Realistically, a residuum of doubt unavoidably shrouds borderline conduct. *See, Ginzburg* v. *United States,* 383 U.S. 463, 475 n. 19 (1966). But reasonable men throughout their lives encounter, experience, and are capable of judging conduct contemptuous of themselves, others, and things. And, while one may choose to applaud flag mutilations, if one is sympathetic with contemptuous acts against the flag, one could hardly doubt their contemptuousness where the flag is hung in effigy and represented as a phallus. Men of all political persuasions may agree that certain uses of the flag are objectively contemptuous.

In *Beauharnais* v. *Illinois,* 343 U.S. 250 (1952) this Court sustained against a challenge for vagueness a criminal group libel statute which as an element of the crime required that the publication or exhibition in question expose "the citizens of any race, color, creed or religion to contempt, derision, or obloquy." Comparable examples of statutory language which this Court has found to give sufficient notice of the act proscribed are many indeed.

Cameron v. *Johnson, supra,* 390 U.S. 611, 616 (1968) ("obstruct" and "unreasonably interfere"); *Adderly* v. *Florida, supra,* 385 U.S. 39, 42-3 (1966) ("with a malicious and mischievous intent"); *United States* v. *National Dairy Corp., supra,* 372 U.S. 29, 32-3 (1963) ("unreasonably low prices for the purpose of destroying competition or eliminating a competitor"); *Roth* v. *United States, supra,* 354 U.S. 476, 491-2 (1957) ("obscene"); *Williams* v. *United States,* 341 U.S. 97 (1951) ("rights, privileges, or immunities secured or protected by the Constitution" and "under color" of law); *Jordan* v. *De George,* 341 U.S. 223, 230-2 (1951) ("crime involving moral turpitude"); *United States* v. *Petrillo,* 332 U.S. 1, 6-8 (1947) (to coerce a license to hire employees "in excess of the number of employees needed by such licensee to perform actual services"); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942) ("any offensive, derisive or annoying word"); additional examples are cited in *Jordan* v. *De George, supra* at 231 n. 15. Thus, given the unavoidable imprecision of language and the need for legislatures to draw statutes that are not so unduly narrow as to allow easy opportunities "to nullify the purposes of the legislation" [*Winters* v. *New York, supra,* 333 U.S. 507, 524-5 (1948) (dissenting opinion)], this Court has clearly expressed a reluctance to void statutes that draw a line that, as here, can fairly be recognized as it is approached. Appellant's heavy reliance upon *Joseph Burstyn Inc.* v. *Wilson,* 343 U.S. 495 (1952) is misplaced. *Burstyn* involved a statute that permitted the banning of a motion picture found "sacrilegious" of "religion." The holding of the Court was that the term "sacrilegious" permitted the state to effect a prior restraint on the expression of views

distasteful to any or all religions, and that from the standpoint of freedom of speech the state had "no legitimate interest" in so protecting religions. *Id.* at 505. The vagueness that inhered in the term sacrilegious stemmed from its application to a historically ambiguous object: religion. "What might have been definite when a controlling church imposed a detailed scheme of observances becomes impossibly confused and uncertain when hundreds of sects, with widely disparate and often directly conflicting ideas of sacredness, enjoy, without discrimination and in equal measure, constitutionally guaranteed religious freedom." *Id.* at 528 (concurring opinion). The object to which the act of contemptuousness is directed in the instant case is the American flag, not the varying political beliefs of Americans.*

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* The dispositions of the cases cited by appellant in a footnote (Brief of Appellant, pp. 25-6) are instructive.

The case against the defendant in *People* v. *Pregaskis* was dismissed on December 9, 1970 in the Town Justice Court, Town of Claverack, Columbia County, New York.

The case against the defendant in *People* v. *Hubner* was dismissed on March 17, 1970 in the District Court, Nassau County, New York. *See, N.Y.L.J.*, March 18, 1970, p. 1, col. 3. While the District Attorney filed a notice of appeal in the *Hubner* case, on August 11, 1970 he withdrew the appeal.

In *Long Island Vietnam Moratorium Comm.* v. *Cahn*, —— F.2d —— (2d Cir., Slip Opn. 328, Dec. 1970), the defendants were charged with a violation of subdivision "a" of the statute—a provision not here in question. In any event, the defendants were victorious. *Ibid.* Further, the District Attorney of Nassau County neither acted improperly in seeking to enforce the statute nor evidenced any political bias. *See New York Times*, January 16, 1970, p. 17, cols. 1-2. The District Attorney, acting on a complaint, indicated his conscientious belief that writing or symbols superimposed upon the flag violated the law, that he "must enforce the law as it is written and as it is determined by the courts," that he would prosecute, "so that the courts can make the final determination," the use of peace symbols placed over the flag as well as displays of the flag with the inscription "Love it or leave it," since he was acting as a law enforcement office and "not because of any political persuasion." *Ibid.* When federal declaratory judgment relief was sought the prosecutor pledged to refrain from prosecution pending the outcome.

In any event, whatever may be said about judging marginal cases of contemptuous conduct, no one could hang a flag in effigy or display it as a penis protruding from pubic hair (91a) and not realize that he had passed the line of authorized conduct. "[I]t therefore strains at technicalities to say that any issue of vagueness of the [statute] as construed and applied is present in the case." *Williams* v. *United States*, 341 U.S. 97, 104 (1951). Conduct so squarely prohibited under any construction of the term does not admit of an argument that fair notice of the act proscribed was not given. *Fox* v. *Washington*, 236 U.S. 273, 277 (1915); *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930); *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949) (concurring opinion); *Jordan* v. *De George*, *supra* 341 U.S. 223, 231-2 (1951); *Williams* v. *United States*, *supra*, 341 U.S. 97 (1951); *United States* v. *Harriss*, 347 U.S. 612, 618 (1954); *Dennis* v. *United States*, 341 U.S. 494, 515-6 (1951); *Scales* v. *United States*, 367 U.S. 203, 223 (1961); *Ginzburg* v. *United States*, *supra*, 383 U.S. 463, 475 n. 19 (1966); *see New York ex rel. Hatch* v. *Reardon*, 204 U.S. 152, 160-1 (1907); *Dombrowski* v. *Pfister*, 380 U.S. 479, 491-2 (1965); *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969).

Radich's further claim, that the definition of an American flag within the meaning of the statute is vague, is frivolous. The statute is quite detailed in its description and while it may encompass many varied representations of the flag, it is hardly vague. And, as the cases just cited show, since appellant was convicted for contemptuous use of an actual American flag, it is ridiculous for him to claim lack of fair notice that such was within the scope of the statute.

Similarly, it is of no avail for Radich to argue that the statute is impermissibly overbroad where his acts were of the "hard core" type that would be prohibited under any construction of the statute and were not privileged under the Constitution. His contention is apparently that even if his conduct—based on the actual mutilation of a flag—is not constitutionally protected, he is certain, for some unexplained reason, that other forms of conduct—such as "unorthodox gestures aimed at the flag" and "flying one's flag at half mast"—would be both included within the statutory proscription and constitutionally protected; therefore, as the "vicarious champion" [see *United States* v. *Dennis,* 183 F.2d 201, 214 (2d Cir. 1950) (L. HAND, J.), *aff'd,* 341 U.S. 494 (1951).] of those he believes patently protected by the Constitution, he claims to be absolved from the consequences of his patently unprotected conduct. The law cannot countenance such a result.

The methodology of determining vagueness in terms of overbreadth can be somewhat elusive and mystifying, even where the specific actions in question approach the borderline of constitutionally protected conduct. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960); Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970). But where, as here, the litigant's conduct could not be protected under the Constitution, it flies in the face of rational and judicial analysis to ask the Court then to set adrift to find any number of hypothetical situations the statute may be thought someday to be applied to, then to determine the constitutionality of such application, and finally, if one hypothetical application would be uncon-

stitutional, to declare the entire statute void even as applied to the unprotected conduct. "The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance * * * 'A hypothetical threat is not enough.'" *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969). It makes a mockery of law to permit one who has engaged in hard-core conduct to assert that the statute might be applied in some hypothetical fashion to prohibit the exercise of some constitutionally protected conduct of a class of individuals to which he clearly does not belong. *Cf. Bryson* v. *United States*, 396 U.S. 64 (1969); *United States* v. *Knox*, 396 U.S. 77 (1969). For, "it requires no great feat of imagination to envision situations" in which many penal statutes might conceivably be applied unconstitutionally. *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 91 (1965). But the remedy is hardly to strike down the statute as applied to the "hard-core" conduct specifically in question. Statutes that admit of varying and different applications carry with them an implicit proviso that no application shall be made to constitutionally protected conduct and that the varying applications are separable should one of them be found unconstitutional. In short, "it seems quite reasonable * * * that if the * * * legislature had known it could not have all it wanted, it would have wanted all it could have." *Samuels* v. *Mackell*, 288 F.Supp. 348 (S.D.N.Y. 1968) (FRIENDLY, J., for three-judge court), *prob. juris. noted*, 393 U.S. 975 (1968), *restored to cal. for rearg.*, 395 U.S. 957 (1969), 399 U.S. 922 (1970). Thus, a judicial finding that a particular application of a statute would be unconstitutional does not require that the statute be voided even as to applications that clearly come within the statute and are not constitutionally protected. *See Street* v. *New*

York, 394 U.S. 576 (1969). Further, if any individual is threatened by an application of statute to conduct he believes is constitutionally protected, he may, in addition to any state remedy he may have [see N. Y. CPLR §3001; *Fenster* v. *Leary,* 20 N.Y.2d 309 (1967)], seek a speedy determination from the federal courts that the particular application of the statute in question may not constitutionally be made. *See Dombrowski* v. *Pfister, supra; Cameron* v. *Johnson, supra; Zwickler* v. *Koota,* 389 U.S. 241 (1967).

Moreover, in the case at bar, it is not clear that the New York Court of Appeals was ever properly presented with and passed upon a question of overbreadth as to the conduct covered. Appellant's brief in the Court of Appeals appeared addressed solely to vagueness as a question of fair notice; no hypothetical examples of overbreadth were presented the Court of Appeals as they are presented to this Court. Accordingly, appellee's brief in the Court of Appeals addressed itself solely to vagueness as a question of fair notice. That court, while passing on all issues raised by appellant, was silent as to overbreadth. Indeed, the appellate courts of New York have not passed upon the situations now conjured by appellant, and have not indicated whether they would uphold prosecutions for such conduct, as a matter of statutory interpretation or constitutional law. Thus, the question of overbreadth in terms of the conduct proscribed is not properly before this Court. *Street* v. *New York, supra,* at 581-2.

In arguing the statute's overbreadth, Radich claims that the Court of Appeals's holding that the statute did not require proof of a specific intent by the actor to cast contempt

upon the flag, would result in a substantial restriction on the freedom of speech. We disagree.

To begin with, the Court of Appeals appears to have been primarily concerned that the statute would not become the focal point either for the suppression of protected speech or for the evaluation of political beliefs. Thus, in deciding whether the defense of subjective good faith motivation of the actor excused conduct objectively contemptuous of the flag, the Court of Appeals held motives, specific intent, irrelevant and the act *malum prohibitum*. But in so holding the court did not eliminate the basic requirement that a deliberate act, objectively contemptuous, must be committed. As explained in *State* v. *Schlueter*, 127 N.J.L. 496, 23 A.2d 249, 250 (N.J. 1941), although the statute did not require commission of the act with a specific intent, "the statute, in making it a misdemeanor to deface or to defile the flag, used those words in their meaning of 'dishonor'. 'Dishonor' is purposeful * * * For illustration: A blind man stumbles over the flag and, not knowing what it is, walks upon it and then casts it aside. Has he 'trampled' upon the flag? Has he 'defaced' or 'defiled' it? Has he 'dishonored' it? [Has he cast contempt upon it?] We think not; because those words carry with them, by inherent meaning, an attitude of mind which is wholly lacking in the supposed instance." Similarly, in *United States* v. *O'Brien*, 391 U.S. 367 (1968) once the deliberate act of burning one's draft card was proven, the First Amendment did not require that the defendant be accorded the defense of good faith political motives. In *Chaplinsky* v. *New Hampshire, supra*, 315 U.S. 568, 574 (1942) in upholding a statute that punished the defendant for the

expression of "fighting words," the court also held that preclusion of a defense of "provocation and * * * truth or falsity of the utterances is open to no Constitutional objection." No specific intent to provoke a breach of the peace was constitutionally required, only the utterance of words objectively "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." Thus, the statute bound Radich to the natural consequences of his deliberate, knowing act of exhibiting items whose subject he was aware of and which were objectively contemptuous of the flag.

Smith v. *California,* 361 U.S. 147 (1959), relied upon by appellant, is not apposite once it is understood that the instant statute requires knowledge of the subject matter of the act and the commission of the act. Smith, the proprietor of a bookstore, was punished for exhibiting items whose subject matter he was unaware of. If he had been aware of the contents of the items, his subjective opinion that they were not obscene under the decision of this Court, or the lack of a specific intent to sell obscene matter that would be found obscene by a jury and upon judicial review, would have been immaterial. *Rosen* v. *United States,* 161 U.S. 29 (1896); *Kahm* v. *United States,* 300 F.2d 78, 86 (5th Cir. 1962), *cert. denied* 369 U.S. 859 (1962); *United States* v. *Oakley,* 290 F.2d 517, 519 (6th Cir. 1961), *cert. denied,* 368 U.S. 888 (1961); *Schindler* v. *United States,* 208 F.2d 289 (9th Cir. 1953); *California* v. *Williamson,* 207 Cal. App. 2d 839, 845, 24 Cal. Rptr. 734, 738 (Dist. Ct. of App. 1962); *also see Alexander* v. *United States,* 271 F.2d 140, 145 (8th Cir. 1959); *United States* v. *Hockman,* 277 F.2d 631, 633 (7th Cir. 1960), *cert. denied* 364 U.S. 837 (1960); *People* v.

Finkelstein, 11 N.Y.2d 300 (1962), *cert. denied* 371 U.S. 863 (1962).

In *Rosen* v. *United States, supra,* this Court specifically rejected a similar contention addressed to a federal statute. There the defense requested a trial instruction of acquittal if a reasonable doubt existed that the defendant knew the mailed material to be obscene. In upholding the refusal to charge in this manner the Court declared:

> "The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mails by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails." 161 U.S. at 41.

In *Ginzburg* v. *United States,* 383 U.S. 463 (1966), the defendant believed that his material was protected by prior Supreme Court rulings; he said so specifically in the advertisements, which this Court accepted at face value. *Id.* at 468, text and n. 9. Ginzburg's belief, while both honest and mistaken, did not prevent his conviction, for he knew precisely the contents of his publications. Guilt cannot be made to depend upon the putative offender's own appraisal of the legal significance of his conduct. Else a man could acquit himself by his own belief in his innocence.

"Rational grounds" for such belief abound. Upholding the constitutionality of a statute penalizing certain acts and at the same time allowing self-serving protestation as a defense is to nullify in practice the premised constitutional power of the state to penalize the acts.

Scales v. *United States*, 367 U.S. 203 (1961) is equally of no assistance to appellant. In *Scales* the government was found to possess a justifiable interest in prohibiting the association of individuals bent on the overthrow of the government; the governmental interest was not transgressed unless it was demonstrated that the individual on trial assumed membership for the proscribed purpose rather than for "the advancement of legitimate aims and policies." If the governmental interests protected by the instant flag statute are sufficient to justify its constitutionality (see Point I, *supra*), then those interests are irretrievably transgressed immediately upon commission of an act objectively contemptuous of the flag, regardless of the actor's motivation—political or commercial. *See United States* v. *O'Brien, supra; Chaplinsky* v. *New Hampshire, supra.* The residue of conduct that would be objectively contemptuous of the flag and yet deserving of protection because the actor intended a result other than contempt is minimal in comparison to the unintended conduct in *Scales.* There, the residue of conduct flowing from membership in an organization—even one whose aims include the overthrow of government—that would be deserving of protection is substantial, absent the member's specific belief in the one proscribed purpose of the organization.

POINT III

The statutory exception that permits certain non-contemptuous uses of the flag if disconnected from advertisements does not deny appellant equal protection.

Finally, Radich claims that the statute denies him equal protection, based on his erroneous reading of an exception contained in the statute:

> "This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for private use in correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

Radich apparently argues that this provision of the statute permits persons to use the flag contemptuously on "ornamental pictures" or in a "newspaper, or periodical" and thus denies him equal protection when it forbids him to use the flag contemptuously on ornamental sculpture. However, read in the context of the entire statute, the major portion of which seeks to prohibit the use of the flag in advertisements, it is quite clear that the exception is intended to permit only non-contemptuous use of the flag for certain purposes, when such use is "disconnected and apart from any advertisement." As the trial court stated:

> "the section does not discriminate between pictures generally and sculpture generally. Only 'ornamental' pictures are excepted. The legislature did not intend to say that pictures desecrating the flag would be exempted as a basis for prosecution and that similar sculpture would not be so protected. Any contemptuous use of the flag comes within the purview of the statute, whether two-dimensional or three-dimensional. We find in this statute no arbitrary discriminatory classification" (28a).

There is a ready and rational distinction between contemptuous and non-contemptuous use of the American flag that permits the legislature to except from penal sanctions certain non-contemptuous uses of the flag without denying a person who uses the flag contemptuously the equal protection of the laws. Indeed, in *Halter* v. *Nebraska,* 205 U.S. 34 (1907) this Court was asked to find that the same statutory exception here in question denied Halter equal protection because Halter was condemned for the non-contemptuous use of the flag in the advertisement of merchandise and under the exception similar non-contemptuous use in "a newspaper, periodical, book, pamphlet, etc.," was not penalized. The Court held that even distinctions between various non-contemptuous uses of the flag were not a denial of equal protection:

> "It was for the State of Nebraska to say how far it would go by way of legislation for the protection of the flag against improper use—taking care, in such legislation, not to make undue discrimination against a part of its people. It chose not to forbid the use of the flag for the exceptional purposes specified in the statute, prescribing the fundamental condition that its use for any of those purposes should be 'disconnected

from any advertisement.' All are alike forbidden to use the flag as an advertisement. It is easy to be seen how a representation of the flag may be wholly disconnected from an advertisement and be used upon a newspaper, periodical, book, etc., in such way as not to arouse a feeling of indignation nor offend the sentiments and feelings of those who reverence it. In any event, the classification made by the State cannot be regarded as unreasonable or arbitrary or as bringing the statute under condemnation as denying the equal protection of the laws." *Id.* at 45.

Appellant was convicted of a contemptuous use of the flag; the exception was therefore inapplicable and could not have denied him equal protection.

Conclusion

The judgment of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted,

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January, 1971